INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statement	2
Argument	7
Conclusion	17

CITATIONS

Cases:

Alderman v. *United States*, 394 U.S. 165	10
Bruton v. *United States*, 391 U.S. 123	12, 13
Chimel v. *California*, 395 U.S. 752	8, 9
Giacalone v. *Lucas*, 445 F. 2d 1238, certiorari denied, 405 U.S. 922	10
Massiah v. *United States*, 377 U.S. 201	14, 15
Porter v. *United States*, 335 F. 2d 602, certiorari denied, 379 U.S. 983	12
Rugendorf v. *United States*, 376 U.S. 528	11
Slawek v. *United States*, 413 F. 2d 957	13
United States v. *Becker*, 485 F. 2d 51	10
United States v. *Cecil*, 457 F. 2d 1178	15
United States v. *Gray*, 462 F. 2d 164	13
United States v. *Hallman*, 438 F. 2d 94	9
United States v. *Lipowitz*, 407 F. 2d 597, certiorari denied, *sub nom. Smith* v. *United States*, 395 U.S. 946	13
United States v. *Lucarz*, 430 F. 2d 1051	11, 12
United States v. *Mapp*, 476 F. 2d 67	9
United States v. *Patterson*, 447 F. 2d 424, certiorari denied, 404 U.S. 1064	9

Cases—Continued	Page
United States v. *Roberts*, 483 F. 2d 226	13
United States v. *Shye*, 473 F. 2d 1061	9
United States v. *Thomas*, 475 F. 2d 115	15
United States v. *Ventresca*, 380 U.S. 102	11
United States v. *Wysocki*, 457 F. 2d 1155, certiorari denied, 409 U.S. 859	9
United States ex rel. Nelson v. *Follette*, 430 F. 2d 1055, certiorari denied, *sub nom. Nelson* v. *Zelker, Warden*, 401 U.S. 917	13
Statutes:	
18 U.S.C. 371	2
18 U.S.C. 2113(a)	2
18 U.S.C. 2113(b)	2

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-912

CHARLES ALBERT MULLIGAN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 488 F.2d 732.

JURISDICTION

The judgment of the court of appeals was entered on November 9, 1973. The petition for a writ of certiorari was filed on December 10, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether, following the arrest of petitioner Christopher, the search of a closet situated two to three feet from him was reasonable in the particular circumstances of this case.

2. Whether the affidavit supporting the warrant to search petitioner Dinsio's home contained a sufficient basis for believing that contraband was being concealed therein.

3. Whether, in a joint trial, separate incriminating statements made by petitioners Dinsio and Mulligan, but not implicating any codefendants, were admissible.

4. Whether incriminating statements made by Dinsio to a fellow inmate, who spontaneously passed them along to government agents, were admissible in evidence.

5. Whether a post-trial hearing was necessary to determine the effect upon defense counsel's ability to represent their clients of a threatening remark purportedly made to defense counsel by an F.B.I. agent late in the trial.

STATEMENT

After a jury trial in the United States District Court for the Central District of California, petitioners were convicted of conspiracy to burglarize a bank, entry into the bank with intent to commit larceny, and theft of money and property from the bank, in violation of 18 U.S.C. 371, 2113(a) and 2113(b). Each was sentenced to imprisonment for concurrent terms of five, twenty and ten years re-

spectively on the three counts. The court of appeals affirmed (Pet. App. A).

1. The burglarized bank was located in a shopping center in Laguna Niguel, Orange County, California. Entry into the bank was gained sometime during the weekend of March 25-26, 1972, by blasting a hole through the concrete roof above the bank's vault and using cutting torches to sever the steel bars reinforcing the roof. Sacks of gravel dug from a nearby area had been carried to the roof and used to muffle the sound of the explosion (Tr. 1112-1117, 1136-1145).[1] Prior to entering the vault, the burglars had circumvented the alarm system electronically, and they deactivated the time locking system (Tr. 1080-1094, 1136). Once inside, they lowered a light attached to an extension cord (Tr. 1152) and then forced open 502 safety deposit boxes and removed their contents, consisting primarily of negotiable securities, bonds, cash, and rare coins. The value of the securities removed from a few of the safety deposit boxes alone exceeded $1,400,000 (Tr. 1061-1062, 1700-1739). In addition, $45,256 in cash belonging to the bank, including some bait money, was stolen (Tr. 1313-1334).

2. The government had no eyewitness testimony. Accordingly, its case against petitioners and their co-conspirators was largely bottomed upon being able to trace their conduct for a period of time beginning approximately six weeks before the burglary and continuing until several months afterward.

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[1] We are lodging with the Clerk of this Court the 25-volume transcript of trial ("Tr.").

a. The evidence of pre-burglary activity included proof that in March 1972 petitioners and their co-conspirators, most of whom (including each of the petitioners) resided in Cleveland or Youngstown, Ohio, converged from different places in the country to an area near the bank (Govt. Exh. 94; Tr. 1350-1354, 1410-1414, 1528-1534, 2219-2233, 3108); that one of the co-conspirators, using an alias, purchased a 1962 Oldsmobile, which petitioner Mulligan stored with a friend, Earl Dawson (Tr. 1510-1517, 2235-2237); and that during March 1972 an individual using the fictitious name of W. Dunn purchased torches, oxygen cylinders and butane cylinders from electrical supply stores in Orange and Lynwood, California (Tr. 2499-2514).

b. The events contemporaneous with and subsequent to the theft show that on Sunday morning, March 26, petitioner Mulligan telephoned Earl Dawson and requested that they meet in a nearby restaurant. At the restaurant Dawson met Mulligan and was introduced to petitioner Dinsio and another individual known only as Joe (Tr. 2238-2242). Mulligan asked Dawson for permission to use Dawson's home for a private "meeting." Dawson agreed. Accordingly, the four individuals drove to the Dawson home. Then, Dinsio and Joe were left behind while Dawson and his wife accompanied Mulligan to a nearby tavern. After they had been at the tavern for an hour, Mulligan made a telephone call. He then told Dawson that "they were busy over there" and wanted to remain another hour. Thus, the Daw-

sons and Mulligan stayed at the tavern for about two hours before returning to Dawson's home. Upon returning, Mulligan, Dinsio and Joe departed almost immediately, leaving the 1962 Oldsmobile still parked in the Dawson garage (Tr. 2242-2248). The following morning, Monday, March 27, Mulligan, Dinsio and Joe returned to the Dawson home, ostensibly for the purpose of allowing Mulligan to say goodby to Dawson before leaving Los Angeles. Petitioner Dinsio conversed with Dawson on his patio for a half-hour, out of the view of the others and beyond the sight of the garage (Tr. 2249-2252). Once again the Oldsmobile was left parked in the garage when Dawson's visitors departed. The government contended that the burglars hid their tools in the trunk of the Oldsmobile on these two visits.

That same morning of Monday, March 27, petitioner Christopher and co-conspirators Charles Broeckel and James Dinsio departed on a flight to Cleveland (Tr. 1487-1489). Two days later, petitioner Dinsio and co-defendant Harry Barber returned to Cleveland on the same flight (Tr. 1491-1492). Prior to his departure, petitioner Dinsio had purchased clothing for himself and his brother and had it mailed to 5816 Mill Creek Boulevard, Youngstown, Ohio (Tr. 1781-1787).

The burglary was discovered on Monday, March 27. Some of the tools used by the burglars were found in an attic area above the vault. In the ensuing weeks F.B.I. agents made other discoveries which led them to the Dawson home. On June 2,

1972, Dawson was interviewed by F.B.I. agents. Later that day a warrant was obtained to search the Oldsmobile, which was still parked in the Dawson garage. In the course of the search, the agents discovered tools and equipment such as an acetylene torch, a tube cutter, a roll of solder, oxygen and acetylene cylinders, walkie-talkies, and miscellaneous wrenches, pliers, and the like (Tr. 1789-1830). Some of these items had been bought at the Lynwood and Orange supply stores by "W. Dunn" a few weeks before the bank burglary. Also among the items discovered were a sledge hammer that had been used to force open the locks of safety deposit boxes at the victimized bank (Tr. 1819, 2003; Govt. Exh. 163), three gold coins which had been removed from one of the safety deposit boxes (Tr. 1820-1821, 2833-2838; Govt. Exh. 165-167), a flashlight containing petitioner Dinsios fingerprint on one of its two batteries (Tr. 1947; Govt. Exh. 186), a "Jersey-Maid" ice cream bag which bore a fingerprint of co-defendant Ronald Barber (Tr. 1934-1936; Govt. Exh. 175), papers showing ownership of the car in the name of "James Wright" (Tr. 1936-1940; Govt. Exh. 177), and the fingerprint of co-defendant Harry Barber on one of these papers (Govt. Exh. 177A). In addition, Barber's fingerprints were found inside the vehicle (Tr. 1942-1944).

While Earl Dawson was being interviewed by F.B.I. agents in the afternoon before the Oldsmobile was searched, he received a long distance telephone call from petitioner Mulligan, who stated that he

would be coming that evening to remove the car and wanted first to meet with Dawson at a tavern. Mulligan also expressed the feeling that he was being watched, and asked Dawson's advice on how to escape a surveillance while travelling from the Los Angeles airport to their meeting place. An F.B.I. agent overheard this conversation with Dawson's permission (Tr. 2254-2255). Later that evening, Mulligan arrived in Los Angeles by air and directed a cab driver to take a circuitous route to the tavern, where he met Dawson (Tr. 1741-1750). Mulligan asked Dawson whether there were any lakes nearby, indicating that he had some tools in the Oldsmobile that he wished to dispose of quickly. When asked by Dawson whether he had been involved in the Laguna Niguel "$2 million bank robbery," Mulligan replied, "Earl, you know I wouldn't do something like that. Besides, it was more like $5 million" (Tr. 2258). Asked about the disposition of the proceeds, Mulligan stated, "Well, you don't get as much as you think; you only get between 13 and 18 percent of the true value back" (Tr. 2260). Upon leaving the tavern, Mulligan was arrested by surveilling agents.

ARGUMENT

1. Prior to trial, petitioner Christopher moved to suppress the money found by F.B.I. agent Roberson in the closet of Christopher's bedroom at the time of his arrest on June 21, 1972, for parole violation. The testimony adduced at the hearing on the motion has been summarized in the opinion of the

court of appeals (Pet. App. 2a-3a). In brief, it shows that Christopher's arrest was effected in the upstairs hallway of a house in which he resided. He was clad only in pajama bottoms, and was therefore permitted to return to his bedroom to dress. Christopher entered the bedroom, and several agents followed him. Although ordered to remain seated at the foot of the bed, Christopher startled the agents by standing to pick up a pair of undershorts lying next to a closet, the door to which was open. Less than a minute later Christopher again stood up and moved toward the closet, situated two to three feet from the bed. He was ordered to return to a sitting position on the bed. Christopher requested a pair of trousers hanging on a hook in the closet by the door. Roberson took the trousers off the hook and passed them to another agent to be searched before handing them to Christopher. Roberson then decided to ascertain whether anyone might be concealed in the closet. Using his hands and feet the agent brushed the clothing and a large garment bag hanging inside the closet. At the bottom of the garment bag Roberson felt a large lump which might have been a weapon. He reached inside and removed a package of tightly wrapped money, amounting to approximately $30,000. Among the bills were two whose serial numbers had been recorded by a lessee of a Laguna Niguel bank safety deposit box before she had placed them in the box (Tr. 2597-2599, 2631-2637, 2647).

It is urged that this search went beyond the permissible limits of *Chimel* v. *California*, 395 U.S. 752.

This contention was properly rejected by the court below, which noted that *Chimel* permits a search of an area within an arrestee's "immediate control," *i.e.*, "the area from which he might gain possession of a weapon or destructible evidence." *Chimel, supra*, 395 U.S. at 763. It certainly was not unreasonable for the federal officers to examine an open closet a few feet away from Christopher, particularly after he had twice made movements in the direction of the closet. See *United States* v. *Wysocki*, 457 F.2d 1155, 1160-1161 (C.A. 5), certiorari denied, 409 U.S. 859; *United States* v. *Patterson*, 447 F.2d 424 (C.A. 10), certiorari denied, 404 U.S. 1064; *United States* v. *Hallman*, 438 F.2d 94 (C.A. 8).[2]

United States v. *Mapp*, 476 F.2d 67 (C.A. 2), and *United States* v. *Shye*, 473 F.2d 1061 (C.A. 6), were correctly distinguished by the court of appeals. *Mapp* dealt with a forced search of a closet identified by another occupant of the residence as the place where the defendant had secreted a bag of narcotics, and *Shye* involved the seizure of a sack of money secreted between a water heater and an adjoining wall about four feet from where suspects were lined up motionless against a wall. We note that the Sixth Circuit recently declined to apply *Shye* in a situation where, as here, the arrestee had not been hand-

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[2] Although all three petitioners appear to challenge the search of the closet in Christopher's bedroom (Pet. 11-16), counsel for Dinsio and Mulligan properly conceded at the pretrial stage that their clients had no standing to contest this search (Tr. 4).

cuffed and was "trying to move in directions other than those prescribed by the officers." *United States* v. *Becker*, 485 F.2d 51, 55 (C.A. 6). See also *Giacalone* v. *Lucas*, 445 F.2d 1238 (C.A. 6), certiorari denied, 405 U.S. 922.

2. On June 27, 1972, F.B.I. agents, armed with a warrant, conducted a search of the Youngstown, Ohio, house in which petitioner Dinsio resided. During the search, an agent located a purse in a downstairs room. He opened it and immediately discovered that it contained a substantial amount of money. Among the bills was a $20 note which had been part of the bait money stolen from the Laguna Niguel bank. An additional $2,850 that could not be traced was found concealed in a stack of grocery bags in a garage storage locker (Tr. 2745-2749). Also discovered during the search of this home was a gold plated 1922 silver dollar belonging to a Laguna Niguel bank safety deposit box holder (Tr. 2795, 2849-2851).

Petitioners contest the validity of the search of Dinsio's home, claiming that the affidavit supporting the warrant issued by the magistrate was inadequate. Neither Mulligan nor Christopher has standing to challenge the search. *Alderman* v. *United States*, 394 U.S. 165, 171-172. As to Dinsio, the claim is without merit.

The information contained in the nine-page affidavit included Dinsio's stay at a motel in Lynwood; telephone calls from his motel room to Earl Dawson's home; the use of the Dawson home for "secret meet-

ings" by Mulligan, Ronald Barber and petitioner Dinsio after the burglary; the discovery of contraband and burglary tools in the trunk of the car left by Mulligan in the Dawson garage; the identification of Dinsio's fingerprints on flashlight batteries found in the trunk and on dishware in a Laguna Niguel apartment; the arrest of Christopher and the discovery of stolen money concealed in his bedroom closet; the discovery of a plastic water dispenser containing $98,600 secreted on property immediately across the street from Dinsio's sole residence; the report of a reliable informant that Dinsio habitually buried a portion of his burgulary loot; the report of another reliable informant that Dinsio had been involved in a $430,000 burglary of a bank in Lordstown, Ohio, after the Laguna Niguel bank burglary; and the fact that when arrested Dinsio had only $537 on his person (See Pet. 16; Pet. App. 5a).

The affidavit, read in a common sense fashion (*United States* v. *Ventresca*, 380 U.S. 102), contained the necessary "substantial basis" for the magistrate to conclude that loot taken from the Laguna Niguel bank probably had been secreted by Dinsio in his home. *Rugendorf* v. *United States*, 376 U.S. 528, 533. The affidavit "demonstrated the theft of the sort of materials that one would expect to be hidden at [a] * * * place of residence, both because of their value and bulk." *United States* v. *Lucarz*, 430 F.2d 1051, 1055 (C.A. 9). The affidavit established that Dinsio was connected with the Laguna Niguel bank burglary and had the opportunity to

conceal his share of the proceeds in his home; that a large sum of money had been found in the vicinity of his residence; and that stolen money had been found in the home of a co-defendant. These factors, plus the "normal inferences" as to where a criminal would be likely to hide a large sum of money and a number of rare coins (*ibid.*), would justify the conclusion that "the most promising place to look for these objects" would be in Dinsio's home. See *Porter* v. *United States*, 335 F.2d 602, 604 (C.A. 9), certiorari denied, 379 U.S. 983.

3. The district court carefully required the incriminating statement made by Dinsio to one Gabriel (see point 4, *infra*) to be shorn of any references to the co-defendants. Petitioners contend that, notwithstanding this editing, that statement and a similar one made by Mulligan to Dawson, implicating only Mulligan, would necessarily have been used by the jury in its determination of guilt of the defendants not named in the statements, because other evidence connected all of the defendants in a similar course of conduct touched upon by the statements. In effect, petitioners argue that confessions are inadmissible in joint trials even if, as here, they are in compliance with *Bruton* v. *United States*, 391 U.S. 123, in that only the declarant has been named therein, and the judge has instructed the jury to consider the incriminating statement only against the maker thereof.

Petitioners' suggestion that the jury considered the statements against non-declarants who were not incriminated by them is a matter of conjecture. Un-

like *Bruton*, the jury was not required to engage in mental gymnastics in order to sift the evidence against each defendant and thereby arrive at independent verdicts. *United States* v. *Roberts*, 483 F.2d 226 (C.A. 5); *United States* v. *Gray*, 462 F.2d 164 (C.A. 5); *United States ex rel. Nelson* v. *Follette*, 430 F.2d 1055 (C.A. 2), certiorari denied *sub nom. Nelson* v. *Zelker, Warden*, 401 U.S. 917; *United States* v. *Lipowitz*, 407 F.2d 597 (C.A. 3), certiorari denied *sub nom. Smith* v. *United States*, 395 U.S. 946; *Slawek* v. *United States*, 413 F.2d 957 (C.A. 8). Indeed, the likelihood that the jury did deliberate in compliance with the court's instructions is bolstered by its verdict of not guilty as to one count charging Christopher with possessing the stolen proceeds in the Central District of California, while convicting petitioners on the remaining charges. As the court of appeals held, "[f]ollowing [petitioners'] argument to its logical conclusion would require separate trials in every case where any defendant has made an admission" (Pet. App. 10a).[3] Nothing in *Bruton* requires such a result.

4. Petitioner Dinsio claims that government witness Gabriel should not have been permitted to testify to the admissions made by Dinsio while both were

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[3] Indeed, the thrust of petitioners' reasoning would appear to require the exclusion of any evidence of the guilt of one of several defendants on the hypothesis that the jury might thereby be influenced to link other co-conspirators with the criminal activities of the particular defendant. This would require separate trials of each defendant in *every* case of joint criminal activity.

confined in the Los Angeles county jail. The facts underlying this claim are as follows:

Petitioner Dinsio was arrested in Ohio at the end of June and thereafter confined in the Los Angeles County Jail. While there he had several conversations with inmate Richard Gabriel, who was a state prisoner then unknown to federal authorities. Dinsio related to Gabriel the details of his role in the burglary, which included circumventing the alarm circuit to avoid activating the alarm and assisting in breaking into the vault through the roof. Dinsio told Gabriel, *inter alia*, that $5 million had been obtained and removed initially to a nearby apartment in Laguna Niguel; that a 1962 Oldsmobile had been used; and that the tools used in the burglary were concealed in a false bottom in the trunk of the car. Dinsio asked Gabriel to assist in establishing an alibi by lining up a motel owner in Las Vegas and a girl who would produce a false registration and testify that Dinsio had been with them during the weekend of the burglary. Gabriel passed this information to federal law enforcement agents (Tr. 3488-3505) and testified to these conversations at trial.

The claim that Gabriel was a "creature of law enforcement" (Pet. 21) and that the statements, made after his arrest, were received in evidence in violation of the "spirit" of *Massiah* v. *United States*, 377 U.S. 201, is belied by the record, which reveals that Gabriel was willing to provide law enforcement authorities with incriminating information gained by chance circumstances when the appropriate occasion arose.

The government agents had no role whatsoever in manufacturing a situation enabling them to obtain evidence from Dinsio after his arrest. Absent proof that government law enforcement agents cooperated purposefully with others to elicit incriminating statements by surreptitious means from individuals after their indictment, *Massiah* is inapplicable. See *United States* v. *Thomas*, 475 F.2d 115 (C.A. 10); *United States* v. *Cecil*, 457 F.2d 1178 (C.A. 8).

5. After Gabriel had revealed to law enforcement officers the substance of his conversations with Dinsio, he offered to serve as an informant for the government and to seek out other incriminating information against Dinsio. While federal agents agreed that Gabriel could so proceed, they admonished him not to solicit information affirmatively, but simply to report any information revealed by Dinsio (Tr. 3255). Gabriel was permitted to proceed with his agreement with Dinsio, made before meeting with law enforcement officers, to assist in establishing a fictitious alibi. Apparently, Dinsio's defense counsel was drawn into this alibi plan, wittingly or unwittingly.

Gabriel's association with the F.B.I. agents was not revealed to defense counsel until late in the trial; he was the final important government witness. Although not supported by the record, petitioners claim that after the Jencks Act statement of Gabriel, containing the reference to a defense counsel, was produced, the case agent, Paul Chamberlain, made a statement to counsel that "[o]ne of you guys is going to jail for five years" (Tr. 4233). This remark was

not made known to the court or government counsel at any time during the remainder of the trial.

In a motion for a new trial, petitioners for the first time raised the matter of this alleged comment and claimed that the threat hindered the ability of each of the defense counsel to assist in the defense of his client. The new trial motion was thereafter denied. The issue was raised in the court of appeals; the court's opinion, however, makes no reference to it.

In this Court, petitioners renew their contention regarding the conduct of agent Chamberlain and urge that, at the least, a hearing was required to ascertain how the conduct of counsel may have been impaired (Pet. 22-24). The courts below properly dismissed petitioners' claim; the record shows that counsel conducted an active and extremely able defense, not only before this incident could have happened, but afterwards as well.[4] Petitioners fail to point out any action which might have been taken by counsel in their defense, but which was omitted because of a sense of fear allegedly instilled by agent Chamberlain.

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[4] Counsel for each petitioner cross-examined Gabriel at length at a hearing out of the presence of the jury. Because Gabriel's trial testimony implicated Dinsio alone, only Dinsio's counsel conducted a cross-examination in front of the jury, which was not made aware of counsel's role, if any, in Dinsio's attempt to fabricate an alibi (Tr. 3203-3293, 3304-3343, 3509-3577).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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